Document 42 Attachment A

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

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Comments on proposed permit modification:
Submitted via US Mail and Electronic Mail
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RE: Proposed Modification of NPDES Permit #WAS026638 for Stormwater Discharges from Joint Base Lewis-McChord, Washington

To Whom it May Concern:

These comments are provided on the proposed modification of NPDES Permit #WAS026638 for stormwater discharges from Joint Base Lewis-McChord (hereafter "the Permit") on behalf of Puget Soundkeeper Alliance, Washington Environmental Council, Natural Resources Defense Council, American Rivers, and Sierra Club (collectively, "Environmental Groups"). These groups submitted an extensive amicus brief supporting the EPA and the original permit to the Environmental Appeals Board in the U.S. Department of the Army's NPDES Appeal No. 13-09 on March 7, 2014.

The Environmental Groups are dismayed by many of the proposed changes to the Permit, which weaken its requirements, undermine its enforceability, and relax already generous deadlines. As described further below, many of the key proposed modifications run afoul of the Clean Water Act's "maximum extent practicable" and water quality protection standards for MS4 permits and cannot be included in a permit without violating the law.

The proposed changes are not a minor or technical matter. Puget Sound, one of the nation's most ecologically and economically significant waterways, continues to deteriorate, and studies continually point to the critical role of stormwater runoff in this collapse. Aggressively addressing stormwater runoff in Puget Sound—through application of the best available standards for new development while simultaneously retrofitting existing developed areas built without adequate controls—is nothing less than a state and national priority. By taking the modest requirements of the original permit and weakening them in multiple respects, the proposed modifications do precisely the opposite. And since this is Region 10's first MS4 permit for Puget Sound, the proposal will also likely serve as the template for future permits governing other federal facilities, some of which—like JBLM—are significant contributors of pollutants to Puget Sound and its waterways. For this reason, EPA must modify or reject the proposed Permit language identified below, or face a separate appeal from our organizations.

EPA's History of Delay In Issuing Stormwater Permits In Puget Sound

Congress amended the CWA in 1987 to resolve long-running disputes about how its important water quality protection standards would apply to municipal stormwater sewer systems. The amendments called for a phased implementation of new municipal stormwater regulations starting with the largest municipalities (Phase I), and moving on to smaller ones (Phase II). 33 U.S.C. § 1342(p). Municipal stormwater permits were required, among other things, to "reduce the discharge of pollutants to the maximum extent practicable." *Id*. at § 1342(p)(3)(b). Many years overdue, EPA issued the Phase I regulations in 1990, and the Phase II rules in 1999. 55 Fed. Reg. 47990 (Nov. 16, 1990) (Phase I rules); 64 Fed. Reg. 68722 (Dec. 8, 1999) (Phase II rules—issued six years after statutory deadline). The Phase II rules, in turn, required issuance of Phase II permits by 2003. 40 C.F.R. § 122.26(e)(9).

EPA's issuance of the first MS4 permit in Puget Sound comes a full decade after that regulatory deadline, and over 25 years after Congress amended the CWA to provide greater clarity on stormwater regulation. Even the state Department of Ecology, which has jurisdiction over nearly a 100 Phase II permittees and whose delay in complying with the CWA has been notable, issued its first round general Phase II permit six years ahead of EPA; Phase I jurisdictions have been regulated since 1995. Moreover, the record reveals that the Army applied for this permit in 2003—a full decade before it was issued. Fact Sheet at 6. EPA's delay in complying with this important provision of the CWA is inexcusable, and the proposed modifications only build upon and deepen the effects of such delay. Every square foot of new impervious surface built in Puget Sound will exacerbate the existing stormwater problem and make the ultimate cost of recovery higher. This history of delay provides important context in considering whether the Permit's modest requirements and lengthy deadlines comply with the requirement that stormwater discharges be addressed in a meaningful manner.

The Proposal Weaken Core Pollution Control Obligations with Vague and Undefined Standards

Perhaps the single most damaging change to the Permit is EPA's proposal to modify the language in multiple places by attaching the words "to the maximum extent practicable" into various Permit provisions governing substantive standards. While EPA chooses to mask this change as "editorial" or as simply providing "clarity," its effect is exactly the opposite. EPA provides no definition of practicability. It leaves the permittee—not EPA—in charge of determining when and where to meet permit standards, and provides them with an excuse to sidestep water quality protection whenever doing so might interfere with competing objectives.

There are multiple instances in which this undefined and uncertain language is inserted into the permit. For example, Permit section II.B.5 currently requires JBLM to implement a stormwater program that "preserves and restores the area's predevelopment hydrology." EPA now proposes to modify this section so that it instead requires JBLM to implement a stormwater program that "maintains the site's predevelopment runoff conditions *to the maximum extent practicable* . . ." (emphasis added). In other sections, such as II.B.5.d and II.B.5.e, EPA proposes to replace requirements to take certain actions "to the maximum extent technically feasible" (i.e., imposing a limit based on technological feasibility) with alternative language requiring action "to the maximum extent practicable" (i.e., arguably introducing undefined considerations of cost). These modifications are in addition to several other references to the "maximum extent practicable" (MEP) standard throughout the existing Permit text.

As a threshold matter, it is important to emphasize that MEP as used in the CWA is a robust and meaningful standard. This standard "does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *see also Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible"). "Practicable" as used in a different section of the Clean Water Act has been defined as meaning that technology is required unless the costs are "wholly disproportionate" to pollution reduction benefits. *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990). Accordingly, § 402(p) by its terms requires permit provisions that reduce stormwater discharges as far as technically feasible, unless costs are "wholly disproportionate" to benefits. EPA must additionally still meet the duty to ensure that permits do not cause or contribute to violations of water quality standards. *In re. Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 EAD 323 (Envt'l. Appeals Bd. 2002).

While the MEP standard is the one adopted by Congress in the 1987 amendments to the CWA, it was never Congress' intention that this open-ended language be simply inserted into permits, leaving it to the permittee's discretion to decide for itself what specific practices to apply in any given situation. While the Environmental Groups do not advocate for rigidity in the selection of BMPs to control stormwater—as the appropriate mix of approaches for any given

situation depends on multiple factors—it is EPA's job to ensure that there is some technical or standard that has to be ultimately achieved.

By attaching the term "to the maximum extent practicable" on various permit obligations, without any definition or underlying standard, the proposal creates a layer of uncertainty on top of a set of provisions in the Permit that were previously unambiguous. As a result, the modifications reduce clarity and complicate enforcement. They arguably allow JBLM to decide for itself whether maintaining predevelopment runoff conditions is "practicable" at any given site, using whatever definition of practicable it chooses. But determining whether a permittee is meeting the requirements of the Clean Water Act is the permitting authority's job. *See Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) (discussed further below). While EPA can evaluate JBLM's decisions after the fact to determine compliance with the MEP standard (and citizen groups can seek to enforce failures to apply the term as Congress intended), this task is much more difficult than simply setting objective standards in the first place – standards with which compliance can readily be judged.

Indeed, directing permittees to satisfy permit requirements "to the maximum extent practicable" contravenes EPA's own guidance for MS4 permits. As EPA states in its *MS4 Permit Improvement Guide*:

> First, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary. … *[V]ague phrases such as 'as feasible' and 'as possible' should be avoided because they result in inconsistent implementation by permittees and difficulties in permit authority oversight and enforcement*. The permit writer's role is to determine what is necessary to achieve in a permit term, and to develop clear, enforceable language that conforms to these determinations.[1]

U.S. EPA, Office of Water, *MS4 Permit Improvement Guide* at 5-6 (Apr. 2010) (emphasis added). For example, the guidance specifically notes that sample permit language requiring a permittee to take action "to the maximum extent practicable" "could be strengthened." *Id*. at 6.

Other EPA Regions have also objected to state-issued MS4 permits on the grounds that they contained the very same language Region 10 has proposed to insert here. For example, EPA Region 3 issued specific objection letters to several Maryland-issued MS4 permits in 2012, stating: "Throughout EPA's permit mark up, we requested removing the use of the phrase 'maximum extent practicable' or 'MEP'. EPA has a number of concerns about inclusion of this language: it is imprecise in its interpretation and thus makes enforcing the permit terms more

[1] A*vailable at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.

difficult; it could lead to backsliding; and it rightfully is a determination to be made by the permitting authority in the permit's terms. All references to MEP with the exception of the requirements that the permittee develop and implement the 'Storm water Management Act of 2007 and Environmental Site Design to the MEP' should be modified."[2] In addition, Region 2 stated in comments on New York's draft statewide Phase II MS4 permit: "NYSDEC states in the MS4 permit that the permittee implement provisions 'to the maximum extent practicable (MEP).' NYSDEC should determine what the MEP, not the permittee, is and the general permit should, to the extent practicable, specify in objective terms what is expected of an MS4 in order to meet the MEP standard."[3] It is completely arbitrary for Region 10 to add this "MEP" language to JBLM's permit when other Regions have explicitly admitted that it undermines enforceability and is otherwise unlawful.

Further, including "to the maximum extent practicable" in permits also flouts the advice of the National Research Council's committee on reducing stormwater pollution. The NRC's seminal report *Urban Stormwater Management in the United States* laments the fact that many permits leave MEP to the "discretionary judgment" of the permittee. National Research Council, *Urban Stormwater Management in the United States* at 101 (2009).[4] According to the NRC, "The ambiguity of the term 'maximum extent practicable' (MEP) has been a major impediment to achieving meaningful water quality results in the MS4 program." *Id*. at 542. The NRC therefore recommends that the MEP standard be defined in concrete, objective terms rather than being left up to the permittee to define.

In light of the National Research Council's findings and EPA's own guidance, inserting the phrase "to the maximum extent practicable" into the Permit is unwarranted and unlawful. This error is compounded by the fact that a few of the new instances of this language in the Permit replace current language directing JBLM to take action "to the maximum extent technically feasible," a stronger standard that does not bear any relationship to cost. EPA should delete all Permit language requiring JBLM to comply with requirements "to the maximum extent practicable," and instead hold the permittee to specific, objective obligations that EPA has already determined satisfy the Clean Water Act's MEP standard.

Inserting "to the maximum extent practicable" is not the only proposed modification that reduces the specificity and undermines the enforceability of the Permit. For example, Section II.B.5 currently requires JBLM to implement a stormwater program that "preserves and restores

[2] U.S. EPA Region III, Specific Objection to Anne Arundel County Phase I Municipal Separate Storm Sewer
System (MS4) Permit MD0068306 at 4 (Aug. 8, 2012); U.S. EPA Region III, Specific Objection to Baltimore County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068314 at 4 (Aug. 8, 2012); U.S. EPA Region III, Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284 at 4 (Aug. 8, 2012). Copies of these documents can be provided upon request.
[3] U.S. EPA Region II, EPA Region 2 Comments on NYSDEC Draft MS4 Permit at ¶ 2 (2010).
[4] *Available at* http://www.nap.edu/catalog.php?record_id=12465.

the area's predevelopment hydrology." EPA now proposes to eliminate that language, and replace it with a duty to "prevent[] or minimize[] water quality impacts."

While the current language is relatively objective and specific, the new proposed language is vague. In addition to adding a qualifier "to the maximum extent practicable," the proposal adds a second requirement, to "prevent or minimize water quality impacts," that is undefined and hence extremely unclear. Does JBLM have to prevent impacts, or minimize them? These two verbs are not synonymous. Further, what does "minimize" mean? How much must impacts be reduced in order to be "minimized"? Perhaps most importantly, how does the first half of the provision (a technology-based requirement) relate to the second half (a water quality-based requirement)? What happens if maintaining predevelopment conditions to the MEP – or whatever JBLM decides MEP means – does not achieve the prevention or minimization of water quality impacts? Is the obligation satisfied, or must JBLM do more? The fact that the provision provides no clear answers to these questions means that it is unacceptably vague, potentially hindering EPA and the public's ability to monitor compliance with, and if necessary enforce, the Permit.

The law is clear that EPA cannot delegate to the Army the discretion to decide its own program. While EPA relies on the Phase II rules, it has evidently overlooked the fact that this aspect of those rules was declared invalid in *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 854-56 (9th Cir. 2003). There, the Court held that the failure to oversee individual stormwater programs was flawed because "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable." *Id*. at 855. Similarly, in a challenge to the 2007 Western Washington Phase I general permit, the state Pollution Control Hearings Board set aside as invalid a permit provision that only required permittees to "reduce" pollutants, without providing either a clear metric or oversight from Ecology. *Puget Soundkeeper Alliance v. State of Washington*, 2008 WL 5510413 (Aug. 7, 2008). Allowing permit compliance to be "left entirely to the discretion of the" permittee amounted to "impermissible self-regulation." *Id*.; *see also Waterkeeper Alliance v. EPA*, 399 F.3d 486 (9th Cir. 2005).

A final example of the proposal's shift towards increasingly vague language is provided in Part II.B.5.c, in which the permittee is required to use source control BMPs to reduce pollution. Whereas previously the Permit required that such BMPs be "selected, designed, and maintained in accordance with" the state stormwater manual, the proposal softens that language to just require that BMPs be "consistent with" the manual. In the fact sheet, EPA takes pains to emphasize that this language does <u>not</u> require "absolute compliance" with the Manual, but it fails to say what it does actually require. How much deviation is allowed? Are untested or novel BMPs allowed because they are generally consistent with the idea of source control? Yet again, EPA has replaced a reasonably clear and accepted standard with an undefined one, leaving JBLM with discretion to determine for itself how much pollution control will be achieved, in violation of the law.

The Proposal Unlawfully Excuses Pollution Control Duties Based on Availability of Funding

EPA further proposes to modify the Permit by explicitly excusing JBLM from full compliance with certain requirements based on funding. Proposed text in section II.B.5.f would allow JBLM to "exempt a project site from full compliance with the performance standards cited above if the severe economic cost criteria referenced in Appendix C.7 prevent use of certain BMPs to attain the performance standards." Additional proposed language in section II.C.2.h would make JBLM's completion of retrofit projects "[s]ubject to the availability of funds." These modifications are inappropriate and unlawful. The duty to comply with the Clean Water Act is not contingent on funding but on achieving a level of technological feasibility and water quality protection as prescribed by the permitting authority. *See State Water Control Board v. Train*, 559 F.2d 921 (4th Cir. 1977). Both proposals undermine these goals.

With regard to the language proposed for section II.B.5.f, to the extent that "severe economic cost" makes the use of "certain BMPs" impracticable, that does not give EPA free rein to excuse JBLM from compliance with the underlying level of water quality protection. The proposed language only refers to the cost of "certain BMPs," but not *all* BMPs. In order to ensure that JBLM in fact reduces its pollution discharges to the *maximum* extent practicable, it should be required to evaluate the use of *all* potential BMPs that can be used to attain the performance standards before it grants an exemption to the project site. Then, if an exemption is granted, it should take the form of a waiver from full *on-site* compliance while still requiring the use of *off-site* mitigation to ensure that the full stormwater flows are captured somewhere on the Base. Off-site mitigation is required in many other MS4 permits in cases of technical infeasibility,[5] and is also recommended in EPA's MS4 permit guidance as an alternative when full on-site compliance cannot be achieved. In contrast, a waiver from any form of compliance is *not* listed as an option in the guidance. *See* EPA, *MS4 Permit Improvement Guide* at 55-56. Therefore, off-site mitigation is clearly a practicable option to ensure full compliance with the MEP standard—and EPA has no basis to depart from its own past practice here, at least without greater explanation. As written, the proposed modification falls short of what is practicable and therefore violates the mandates of the Clean Water Act.

With regard to the language proposed for section II.C.2, a funding proviso is inappropriate for a requirement aimed at attainment of water quality standards. A lack of funding cannot excuse continued non-compliance with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a); 40 C.F.R. §§ 122.4(d), 122.44. From a practical perspective, this

[5] *See, e.g.*, U.S. EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System at 4.1 (Oct. 2011, modified Nov. 2012), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf; West Virginia DEP, General NPDES Permit No. WV0116025 for Small MS4s at II.C.7.e.11.b (July 2014), *available at* http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/MS4%20GP%202014.pdf.

language removes incentives for JBLM to actively seek funding; if the Army knows from the start that it will face no consequences from failure to actively seek funding for retrofits, there is no apparent reason why it would even seek funding, nor any incentive for Army leadership or Congress to provide it. Allowing such a precedent in a municipal permit threatens to undermine the entire system of MS4 regulation. EPA should delete this proposed text from II.C.2.

The Proposal Provides an Unnecessary New Exemption for "Competing Needs"

Similar to the proposed language providing an exemption for compliance in cases of "severe economic cost," proposed language for section II.B.5.e.iii's hydrologic performance standards also allows JBLM to exempt project sites from full compliance due to "competing needs." This language is extremely unclear. "Competing needs" could be interpreted to mean nearly any Army objective that is not protection of water quality. Indeed, the list of examples provided in the proposal is undefined but effectively invites the Army to seek exemptions for any purpose at all. For example, the proposal suggests that exemptions may be warranted wherever there is a conflict with "specific military mission requirements." Given that virtually everything occurring at JBLM can be said to be associated with a "military mission," it is hard to say where this exemption ends. Moreover, the proposed language does not explain how JBLM is to weigh these "competing needs" against water quality objectives in order to provide an exemption. Given its vagueness, this language will inevitably lead to inappropriate exemptions from the Permit's requirements, including in cases when full compliance is actually practicable. It is therefore incompatible with the MEP standard and must be rejected.

The Proposal Fundamentally Guts the Important Retrofit Requirements

The Environmental Groups are deeply disappointed that the proposal eliminates the requirement that JBLM to develop and implement a retrofit "plan," and replaces it with a conditional and exceedingly modest requirement that the Army develop a retrofit "report" with significantly reduced implementation requirements. Section II.C, currently titled "Stormwater Retrofits To Reduce Discharges to Impaired and Degraded Receiving Waters," presently requires the development of a "retrofit plan" to reduce flows and pollutant loadings from existing impervious surfaces. Parts of this plan must be implemented, such as rooftop disconnection retrofits, as well as the initiation and completion of at least one structural retrofit. The plan must also prioritize project locations, suggesting that retrofits will ultimately be done in those locations. Retrofitting is critical to the protection and recovery of Puget Sound's threatened water resources. Standards for new development will only prevent the problem from getting worse; to make progress on restoring water quality, as the CWA expects, requires that existing developed areas be retrofitted to reduce or eliminate runoff. The Permit's original modest requirements at least made some progress towards this goal; the proposal all but eliminates them.

EPA now proposes to effectively gut the entire section II.C, which is evident at the outset from the proposed new section title, "Stormwater Retrofits *Report on Reduction* of Pollutant Discharges...." Whereas the "plan" required by the current Permit implies that it will lead to

action, the "report" required by the proposed modifications lacks that implication entirely.[6] Section II.C's requirement to perform rooftop disconnection retrofits has been entirely eliminated, and the proposed text would require JBLM to initiate *but not to complete* one single retrofit project in the entire permit term. And "initiating" a project is undefined, meaning virtually any action to make progress towards a project—such as assigning a project number or requesting funding—could theoretically suffice. In a five-year permit, this is modest indeed, and a major step backwards from the initial permit.

With these proposed changes, the Permit would fall short of the "maximum extent practicable" standard. Numerous other permits—including Phase II permits—require retrofit plans to be developed *and implemented.*[7] EPA has provided no evidence why implementation of the plan (or "report") is not similarly practicable for JBLM; and indeed, it is difficult to think of an entity with greater resources than the U.S. Army. The proposed language also violates the MEP standard because it provides that, if evaluation of monitoring data does not indicate that JBLM's discharges impact water quality, no retrofit "report" is even required in the first place – even if completing one would be practicable. (Indeed, the fact that the Permit requires preparation of such a report under the alternative water quality scenario seems to verify that it is practicable.) Under the Clean Water Act, the MEP standard always applies as a technology-based standard irrespective of any water quality impacts (or lack thereof). It sets the floor or minimum of what MS4s must do. *See* EPA, *NPDES Permit Writers' Manual* at 3 (Sept. 2010).[8] Thus, if preparation of a retrofit report, and implementation of such a report, is practicable, then the Permit must require it.

Further, the proposed language in section II.2.C would eliminate the performance criteria that the current Permit establishes for the one retrofit project that JBLM is required to "initiate." EPA proposes to delete the requirement that JBLM's retrofit project be "sufficient to disconnect and infiltrate discharges from effective impervious surfaces equal to five (5) acres of cumulative area," leaving no performance metrics whatsoever for the project. Removing this provision and substituting no alternative metrics would contradict EPA's own statements that MS4 permit provisions should be "clear, specific, measurable, and enforceable," should "incorporate clear performance standards," and should "include measurable goals or quantifiable targets for implementation." EPA, *MS4 Permit Improvement Guide* at 5. It would also leave EPA unable to determine whether JBLM's retrofit project has satisfied the obligation to reduce pollution

[6] *See* Merriam-Webster, Definition of "Plan," http://www.merriam-webster.com/dictionary/plan ("something that a person intends to do").
[7] *See, e.g.*, U.S. EPA Region III, Permit for the District of Columbia Municipal Separate Storm Sewer System at 4.1.5; Virginia Department of Conservation & Recreation, Permit No. VA0088579 for the Arlington County Municipal Separate Storm Sewer System at I.B.2.c (June 2013), *available at* http://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/13/2013/10/MS4-Permit.pdf.
[8] *Available at* http://water.epa.gov/polwaste/npdes/basics/upload/pwm_chapt_01.odf ("A permit provides two types of control: technology-based limitations (based on the technological and economic ability of dischargers in the same category to control the discharge of pollutants in wastewater) and water quality-based limitations (to protect the quality of the specific waterbody receiving the discharge).").

discharges to the maximum extent practicable. As a result, deleting the performance standards from the Permit's retrofit requirement would render the Permit arbitrary, capricious, and an abuse of discretion, and EPA should reject this proposed modification.

The Proposal Invites Reliance on Unapproved "Alternative Documents" Without Standards or Public Scrutiny

The Environmental Groups object to the proposed language in section II.B.5 that would allow JBLM to develop and submit "an alternative document, plan or program that describes functionally equivalent run-off controls" instead of following the approved, widely-accepted state manuals, including the *Stormwater Management Manual for Western Washington.* The Permit does not explain what EPA's metrics will be for approving these "alternative documents." In what ways are they expected to be "functionally equivalent" to the Washington manual? The fact sheet accompanying the proposed modifications states that EPA considers the Washington manual to define the acceptable "minimum content" of stormwater plans and programs, but it does not explain how it will determine whether JBLM's "alternative documents" meet that minimum. In fact, the Washington manual provides extensive flexibility—there is no demonstrated need for alternative approaches.

Even more problematically, allowing the use of "alternative documents" to define JBLM's legal obligations is unlawful because it violates the public participation requirements of the Clean Water Act. In these "alternative documents," JBLM would be developing its own requirements – effluent limitations not contained within the Permit itself – outside of the official permitting process and its attendant opportunities for public comment and hearings. This scenario would violate the ruling of the U.S. Court of Appeals for the Ninth Circuit in *Environmental Defense Center v. EPA*. In that case, the court stated that permittee-developed documents "that contain the substantive information about how the operator of [an] MS4 will reduce discharges to the maximum extent practicable" must be "subject to the public availability and public hearings requirements of the Clean Water Act." *Environmental Defense Center v. EPA*, 344 F.3d 832, 857 (9th Cir. 2003). As a result, EPA must either require JBLM to comply with effluent limitations on which the public has already had a chance to comment and seek a hearing; or it must provide for the Permit to be formally modified upon submission of the "alternative documents," triggering opportunities for formal public participation. While the Environmental Groups do not oppose reasonable flexibility and opportunity for innovative approaches, there has to be a substantive standard by which these approaches are judged, and public input via a formal permit amendment process and appeal opportunity before they can substitute for widely accepted standards.

The Proposal Unlawfully and Unnecessarily Extends Most of the Permit's Deadlines

The Environmental Groups are disappointed by the extraordinary deadline extensions that appear in virtually every provision of the proposed modifications. For example, preparation of a

stormwater management plan had its deadline extended from one year from the permit's effective date to nearly three years from that original date. Another deadline (construction site inspection plans – part II.B.4.g) was moved from six to twenty-four months. Remarkably, no justification or even explanation whatsoever is provided for these lengthy extensions outside of the Army's preference. Presumably EPA had a rational basis for imposing the original deadlines: it must now explain why the original deadlines were inappropriate and how the new protracted deadlines are in line with the Clean Water Act's MEP standard, particularly in light of the extraordinary delay in imposing the CWA's requirements in the first place. Indeed, in its brief to the EAB, EPA affirmed that "at no point" in the lengthy development of the permit did JBLM staff ever raise concerns about meeting deadlines or standards. Region 10 Response Brief at 7. JBLM did not even provide comment on deadlines, meaning the Army was prohibited from appealing them to the EAB. Given that the Army should already have begun implementation of the Permit's requirements, which have been in effect since August 22, 2013, it is concerning that EPA should nevertheless grant JBLM additional years of continued pollution discharges.

Default Hydrologic Performance Standards

Section II.B.5.e.iii of the existing Permit requires JBLM to design stormwater controls to retain stormwater produced by the 95th percentile storm, with an alternative approach being to limit peak flows. EPA now proposes to modify this provision by reversing the order in which these two options are listed, presenting peak flow limits as the default approach with on-site retention as the alternative.

The Environmental Groups strongly believe that a focus on limiting peak flows should not be the default approach to stormwater management on this Base or elsewhere. The National Research Council has strongly stated that a focus on peak discharges is less effective at protecting water quality than a focus on reducing overall stormwater volume. As the NRC explains, the emphasis in the past on reducing peak flow by using detention ponds, leaving the underlying increase in runoff volumes untouched, "explains why evaluation of downstream conditions commonly document little improvement resulting from traditional flow-mitigation measures." NRC, *Urban Stormwater Management in the United States* at 33; *see also id*. at 497. Succinctly stated, "effective hydrologic mitigation for urban development cannot just aim to reduce post-development peak flows to predevelopment peak flows." *Id*. at 6. For this reason, the NRC recommends that stormwater management efforts focus *first* on the prevention of the generation of pollutants and the reduction of the volume of runoff reaching stormwater systems – and only after those efforts have been exhausted should management efforts turn to a focus on the reduction of peak flows. *Id*. at 395. EPA should therefore restore the existing text of section II.B.5.e.iii, keeping on-site retention of stormwater as the default, preferred approach.

Endangered Species Act Consultation Must Be Reinitiated Prior to Completing any Modifications.

On July 6, 2013, the National Marine Fisheries Service ("NMFS") completed the Endangered Species Act consultation process by confirming that the original permit was not likely to adversely affect marine species listed in Puget Sound. (Administrative Record document 83). The U.S. Fish and Wildlife Service issued a similar letter on June 20, 2013, with respect to Bull Trout and terrestrial species. NMFS confirmed that injuries to salmon occur from stormwater at very low concentrations, but observed that the permit would not result in exceedances of those concentrations.

With the proposed modifications that weaken permit terms and give the Army far greater discretion to set its own standards or give itself exemptions, the criteria that led the wildlife agencies to determine that ESA standards would be met are no longer assured. Indeed, the standard in the ESA is that EPA must "ensure" that jeopardy to species, or adverse modification of their critical habitat, will not occur. Without clear standards, there is no way for EPA to "ensure" that this standard is achieved, in violation of the ESA. And as the concurrence letters correctly point out, the fact that EPA is proposing to modify the standards means that consultation must be reinitiated before any modifications are finalized. We expect to work with NMFS and FWS to ensure that the flaws in the proposal that fail to protect water quality are corrected.

Additional Comments on Draft 401 Certification

We are encouraged that the State Department of Ecology has refused to unconditionally approve the proposed changes, and sought modifications that address some of our concerns identified above. For example, we agree that certification should be denied for the provisions related to alternative plans and open-ended exemptions from hydrologic performance standards. We urge Ecology to consider adding additional conditions addressing the other flaws outlined above, most notably the repeated adoption of language (e.g., "to the maximum extent practicable" and "to the extent funding is available") that weakens protections and undermines enforceability.

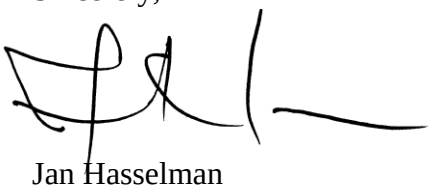
In one respect, we disagree with Ecology's proposal. Condition #5 of the decision requires EPA to modify the permit to allow the permittee to choose between a performance standard and a "list approach" to implementing BMPs. However, this requirement is in our view one of the weakest features of the state general permits, as it focuses on efforts to implement a modest list of BMPs rather than an ecological performance standard. In our view, requiring a clear performance standard—and allowing flexibility on the best low impact development BMPs used to achieve it—is the best way to protect water quality. For example, the "list" approach does not require meaningful design of projects to minimize impervious surface and maximize protection of natural features—perhaps the single most important approach to protecting water quality from stormwater. Rather than demand that EPA adopt a weak feature of the state

permits, the certification should give EPA the flexibility to do what it did in the original permit—insist upon achievement of a rigorous performance standard in all cases, and not allow use of a truncated and incomplete list of LID BMPs that fails to ensure protection of water quality.

In conclusion, in its brief to the EAB, EPA mounted a robust defense of its permit and explained its justification for concluding that the standards therein were required to meet the MEP standard. One important consideration was that every jurisdiction around JBLM, from major counties to small towns, is already required to meet essentially identical standards. Yet, in the face of a meritless appeal, EPA chose to weaken those standards across the board, without any apparent justification and, it appears, solely to satisfy the preferences of the permittee. That is not an approach that would withstand judicial review. We urge you to reaffirm the original permit and, if necessary, continue to defend it before the EAB.

Thank you for your consideration of these comments. If you wish to discuss them further, please contact me at (206) 343-7340 ext. 1025.

Sincerely,



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